

Office of Chief Counsel
Internal Revenue Service

memorandum

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date: July 30, 2001

to: Ruth Leder, Tefra Coordinator, QMS1
Los Angeles Office

from: ROBERT H. SCHORMAN, JR.
Attorney (LMSB)

subject: [REDACTED]

TIN: [REDACTED]

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Questions Presented

1. Who is the Tax Matters Partner for [REDACTED] (" [REDACTED] ") for the [REDACTED] tax year.
2. Whether or not [REDACTED] is a general partner of [REDACTED] for the [REDACTED] tax year.
3. Whether the Form 872-P Consent to Extend the Time to Assess Tax Attributable to Items of a Partnership signed by the

assistant secretary of [REDACTED] for the [REDACTED] tax year is valid.

Conclusions

1. [REDACTED] is the Tax Matters Partner for [REDACTED] for the [REDACTED] tax year.
2. [REDACTED] is not a general partner of [REDACTED] for the [REDACTED] tax year.
3. The Form 872-P Consent to Extend the Time to Assess Tax Attributable to Items of a Partnership signed by the assistant secretary of [REDACTED] for the [REDACTED] tax year is valid.

Summary of Facts

[REDACTED] is a TEFRA partnership for federal income tax purposes. The file contains a copy of a Form 1065 U.S. Partnership Return of Income for [REDACTED] for the tax year beginning [REDACTED] and ending [REDACTED]. A transcript in the file indicates the return was received by the Service on [REDACTED]. On page 2 of this return, [REDACTED] is designated as the Tax Matters Partner for the short tax year ending December 31, [REDACTED]. According to your memorandum dated June 11, 2001, no election was ever made to terminate the designation of [REDACTED] as Tax Matters Partner of [REDACTED] for [REDACTED] and to designate another Tax Matters Partner.

According to the Schedule K-1s attached to the return, there were two partners in [REDACTED] (" [REDACTED] ") and [REDACTED] (" [REDACTED] "). [REDACTED] held a [REDACTED] % interest in profit sharing, loss sharing and ownership of capital. [REDACTED] held the remaining [REDACTED] % interest.

According to the Recitals in the Third Amended and Restated Limited Liability Company Agreement of [REDACTED] ("Third Amended LLC Agreement") dated [REDACTED], [REDACTED] was organized under the Delaware Limited Liability Company Act on [REDACTED] by [REDACTED] and [REDACTED] pursuant to a Limited Liability Company Agreement of [REDACTED] dated [REDACTED].

On [REDACTED], [REDACTED] bought a [REDACTED] % interest and [REDACTED] bought a [REDACTED] % interest in [REDACTED] from the initial members.

On [REDACTED] [REDACTED] transferred its entire interest in [REDACTED] to [REDACTED] (" [REDACTED] ") and [REDACTED] simultaneously transferred this interest to [REDACTED], a Delaware limited liability company. Thus beginning on [REDACTED], the partners (LLC members) of [REDACTED] were [REDACTED] and [REDACTED].

The Form 1065 U.S. Partnership Return of Income for [REDACTED] [REDACTED] for the tax year beginning [REDACTED] and ending December 31, [REDACTED] designates [REDACTED] as the Tax Matters Partner for the tax year ending December 31, [REDACTED].

Attached to the copy of the Form 1065 U.S. Partnership Return of Income for [REDACTED] for the tax year beginning [REDACTED] and ending December 31, [REDACTED] is a Form 872-P Consent to Extend the Time to Assess Tax Attributable to Items of a Partnership which by its terms extends the time to assess tax for the tax period ending December 31, [REDACTED] to December 31, [REDACTED].¹ The consent is signed in the signature space for the Tax Matters Partner by [REDACTED] as " [REDACTED] [REDACTED] Tax Matters Partner of [REDACTED] General Partner of [REDACTED] ." The date next to [REDACTED]'s signature is [REDACTED]. The consent is signed by Frederick Ferrarin, Case Manager, on behalf of the Service on [REDACTED].

The file contains a photocopy of a previous Form 872-P for [REDACTED] which by its terms extends the time to assess tax for the [REDACTED] tax year to December 31, [REDACTED]. It is executed by [REDACTED] as Tax Matters Partner on [REDACTED]. It was countersigned on behalf of the Service by James R. Mack, Case Manager, on [REDACTED].

The Third Amended LLC Agreement was in effect at the time [REDACTED] signed both Form 872s described above. It contains the

¹We note that a Form 872 Consent to Extend the Time to Assess Tax for the [REDACTED] tax year was executed by [REDACTED] extending the time for assessment of tax to [REDACTED]. This Form 872 contains the following language: "With respect to the period described in Section 6229(a) of the Internal Revenue Code, this agreement applies to any tax or additions to tax attributable to partnership items and affected items." This language should extend the statute of limitations for the [REDACTED] tax year as to [REDACTED] which was wholly owned by [REDACTED].

following relevant provisions in "ARTICLE [REDACTED] MANAGEMENT OF THE COMPANY" and "ARTICLE [REDACTED] SERVICES PROVIDED BY MEMBERS":

"[REDACTED] Management. [REDACTED]
[REDACTED]
[REDACTED]"

"[REDACTED] Management Board.

(a) [REDACTED]
[REDACTED]
[REDACTED]" ...

"[REDACTED]
[REDACTED]
[REDACTED]"

"[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]"

"[REDACTED] Tax Elections. [REDACTED]
[REDACTED]
[REDACTED]"

"5.7 Tax Matters Partner. [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]"

"[REDACTED] Services to Be Provided by [REDACTED]
[REDACTED]
[REDACTED]"

[REDACTED]
[REDACTED]:

(a) [REDACTED]
[REDACTED]"

No provision in the Third Amended LLC Agreement explicitly limits the power of a member to bind the Company.

Legal Analysis

Tax Matters Partner for [REDACTED] Tax Year

[REDACTED] designated [REDACTED] as its Tax Matters Partner ("TMP") for tax year [REDACTED] on its [REDACTED] partnership return. This is a permissible means of designation. Treas. Reg. § 301.6231(a)(7)-1(c).

Treas. Reg. § 301.6231(a)(7)-1 provides the exclusive procedures for a partnership to designate and terminate the designation of a Tax Matters Partner. Treas. Reg. § 301.6231(a)(7)-1(a). This memorandum assumes that [REDACTED] did not elect to terminate the designation of [REDACTED] as Tax Matters Partner for Tax Year [REDACTED] as represented in your memorandum dated June 11, 2001.

There are certain events that automatically terminate the designation of a TMP under the regulation: (1) the death of the TMP; (2) an adjudication by a court that the TMP is incompetent; (3) the liquidation or dissolution of the TMP; (4) the conversion of the TMP's partnership items into nonpartnership items under section 6231(c) (relating to special enforcement areas); (5) the resignation of the TMP; (6) a subsequent designation of a new TMP under the regulation; and (7) a revocation of the designation by the partnership. Treas. Reg. § 301.6231(a)(7)-1(l)(1). There is no indication in the file that any of these events have occurred or are applicable.

Under these circumstances, since no election has been made by the partnership and no event has occurred to terminate the designation of [REDACTED] as the TMP for [REDACTED], [REDACTED] is still the TMP for [REDACTED] for the tax year [REDACTED].

Status of [REDACTED] During [REDACTED]

[REDACTED] did not acquire any membership interest in [REDACTED] until [REDACTED]. After [REDACTED], it had an indirect interest in [REDACTED] through [REDACTED]

[REDACTED]. Therefore [REDACTED] was not a member or treated as a partner of [REDACTED] for federal income tax purposes during tax year [REDACTED].

Validity of Form 872

[REDACTED]'s [REDACTED] Form 1065 was filed on [REDACTED]. The statutory period for assessing any income tax attributable to partnership items for a partnership's tax year expires three years after the partnership files its partnership information return or three years after the last day for filing such return, whichever is later. I.R.C. § 6229(a). The last day for filing the [REDACTED] return was [REDACTED]. I.R.C. § 6072(a). Thus, the time for assessment of the partnership's [REDACTED] taxes would expire without extensions on [REDACTED]. Since the later Form 872 was executed before the statute expired and any extension pursuant to the earlier Form 872 has already expired, only the later will be analyzed in this memorandum. However, since the same entity executed the earlier Form 872, the analysis is also applicable to the earlier Form 872.

I.R.C. § 6229(b)(1)(B) allows extension of the period for assessment "with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner (or any other person authorized by the partnership in writing to enter into such an agreement), before the expiration of such period."

Treas. Reg. §301.6229(b)-1T, as adopted on March 2, 1987, provides that a partnership can appoint someone other than the TMP to enter into an agreement to extend the three-year period under section 6229(a) on behalf of the partnership by filing a statement with the service center where the partnership return was filed that includes the authorization, the identity of the partnership and the person being authorized to represent the partnership, the partnership year or years affected by the authorization, and the signature of all the persons who were general partners at any time during the year or years for which the authorization is effective.

(b)(7)a

(b)(7)a

(b)(7)a

In Cambridge Research and Dev. Group v. Commissioner, 97 T.C. 287 (1991), the Tax Court held that Treas. Reg. § 301.6229(b)-1T was permissive rather than mandatory and that an agreement to extend the three-year period under section 6229(a)

was valid when it was signed on behalf of the partnership by a general partner authorized to carry out "partnership business" on behalf of the partnership under Connecticut law and a partnership agreement. Other Tax Court cases have held that a partnership agreement is a sufficient writing under section 6229(b)(1)(B). See, Iowa Investors Baker v. Commissioner, T.C. Memo. 1992-490; Georgetown-Petroleum-Edith Forrest v. Commissioner, T.C. Memo. 1994-13.

Applying the Cambridge analysis to this case, the question becomes whether [REDACTED] was authorized under the Third Amended LLC Agreement and Delaware law to sign the Form 872-P.

(b)(7)a [REDACTED]

(b)(7)a [REDACTED]

(b)(7)a [REDACTED]

Del. Code Ann. tit. 6, § 18-402 states in relevant part that "[u]nless otherwise provided in a limited liability company agreement, each member and manager has the authority to bind the limited liability company."

The Third Amended LLC Agreement does not contain any provisions explicitly limiting the authority of the members to bind the limited liability company. Therefore, as a member of [REDACTED], [REDACTED] would have the power to bind [REDACTED].

Moreover, in section 6.1.1(a) of the Third Amended LLC Agreement, [REDACTED] is specifically authorized to provide tax advice and services to [REDACTED]. In Iowa Investors Baker, supra, the Tax Court, in reaching its conclusion that a partner other than the TMP could execute a valid consent found it significant that the partnership agreement gave the partner who signed the consent the power to "manage all partnership affairs, including ... tax services... on behalf of the partnership to individual partners." We think that a court could find this provision sufficient written authorization for [REDACTED] to consent to extend the statute of limitations.

(b)(7)a [REDACTED]

(b)(7)a [REDACTED]

(b)(7)a [REDACTED]

In Medical and Business Facilities, the U.S. Court of Appeals for the 5th Circuit found, contrary to the Tax Court, that

the partnership agreement, by vesting authority for the management and control of partnership business in a management committee composed of general partners, restricted any single general partner's power to bind the partnership. The Fifth Circuit held that the general partner, who was not the TMP for the years in question, was not authorized by the partnership agreement to sign consents to extend the limitations periods for the partnership.

However, the instant case is distinguishable from Medical and Business Facilities because the Third Amended LLC Agreement states that [REDACTED] is appointed the TMP of [REDACTED]. Although the agreement fails to specify the years for which [REDACTED] is appointed the TMP, it is clear from this provision that the management board of [REDACTED] did not reserve to itself the powers of a TMP, which include the power to sign a consent to extend the period of limitations. Moreover, the members of [REDACTED] may have intended by this provision that [REDACTED] replace any prior TMPs for all open periods, but may have failed to take the administrative steps pursuant to the regulations necessary to do so. Finally, Medical and Business Facilities would not be controlling precedent in the Ninth Circuit, where any litigation of this issue in the instant case would occur.

(b)(7)a

(b)(7)a

(b)(7)a

There may be an additional argument for the validity of the Form 872-P signed by [REDACTED] on behalf of the TMP of [REDACTED] based on apparent authority. Under Delaware law, an agent can bind the principal on an apparent authority basis only if the third person involved reasonably concludes that the agent is acting for the principal. In dealing with the agent, the third person must act with ordinary prudence and reasonable diligence in ascertaining the scope of the agent's authority. International Boiler Works Co. v. General Waterworks Corp., 372 A.2d 176 (Del. 1977). [REDACTED] was put forward by [REDACTED] as a person authorized to sign the Form 872-P. As an officer of the TMP of [REDACTED], a member of [REDACTED] with a majority interest, it was not unreasonable for the Revenue Agent to believe that [REDACTED] had authority to bind [REDACTED]. Moreover, [REDACTED] had signed the previous Form 872-P in the file. [REDACTED] is also the vice president for tax planning of [REDACTED], the parent of [REDACTED]. There do not appear to be any facts that would indicate [REDACTED] lacked authority to sign the consent.

There may also be an argument based on equitable estoppel to

uphold the validity of the consent. The doctrine of equitable estoppel applies when a party intentionally, or unintentionally, induces another to detrimentally rely on the party's conduct. Burge v. Fidelity Bond & Mortgage Co., 648 A.2d 414, 420 (Del. 1994). Here, [REDACTED] held out [REDACTED] as a person authorized to sign the consent. The Service relied on this representation to its detriment if [REDACTED] was not in fact authorized to sign the consent, since the original statute of limitations has run. Therefore, [REDACTED] should be estopped from arguing that the consent was invalid for want of authority.

Conclusion

Based on the foregoing arguments, we believe that the Form 872-P executed by [REDACTED] on April 7, 2000 is valid.

ROBERT H. SCHORMAN, JR.
Attorney (LMSB)